Hemraj & Co Sdn Bhd & Anor v Tenaga Nasional Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — APPEAL NO W-02(NCVC)(W)-2256–11 OF 2018
LEE SWEE SENG, AZIZAH NAWAWI AND GHAZALI CHA JJCA
21 JUNE 2022

Tort — Negligence — Non-delegable duty of care — Property owner employed independent private contractors to install sewerage connection between property and sewerage tank owned by Indah Water Konsortium ('IWK') — Work involved excavation of public road in front of property — Property owner failed to obtain necessary approvals from local authority, electricity supply provider Tenaga Nasional Bhd ('TNB') and IWK before starting excavation work — Utility mapping also not obtained from relevant parties to identify where underground utility cables and pipes lay — Excavation work damaged TNB's high-tension power cable — Whether High Court was right to find property owner liable for the damage for breaching its non-delegable duty of care to ensure that all requisite approvals had been obtained and pre-conditions satisfied before the excavation work commenced

The first appellant ('Hemraj'), which owned a bungalow, had appointed the second respondent contractor ('R2') to connect the bungalow's sewerage system to a sewerage tank owned by Indah Water Konsortium Sdn Bhd ('IWK'). To enable the connection to be made, a part of the public road in front of the bungalow had to be excavated. The excavation work was tasked to the third respondent ('R3'), a licensed sewerage contractor while the fourth respondent ('R4') hired a backhoe operator and supervised the excavation. The excavation work, which was carried out without obtaining the pre-requisite approvals of the first respondent ('TNB'), the local authority ('DBKL') and IWK, damaged a 132KV underground oil-filled cable belonging to TNB. TNB sued Hemraj and its director (the second appellant) and, after a trial, obtained judgment against Hemraj for RM3,110,445.09 plus administrative costs to replace the damaged cable. TNB's claim against the second appellant was dismissed but the trial court allowed the appellants' claim for indemnity against R2, R3 and R4 who were added as third parties to the suit and who were held jointly and severally liable for the damages and costs that were awarded against Hemraj, conditional upon Hemraj making full payment of the same to TNB. The trial judge held that Hemraj was negligent in breaching its non-delegable duty of care by allowing the unauthorised excavation works to be carried out in a negligent manner by the contractors on a public road thereby damaging TNB's underground cable. In the instant appeal against the decision, Hemraj contended that it should not have been held liable for the negligence of R2, R3 and R4 who were independent contractors employed by

Hemraj. Hemraj also argued that TNB had never pleaded against it a non-delegable duty of care and that the trial judge also erred in failing to apply the principle in *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GMBH* [2009] 3 WLR 3242 ('*Biffa*'s case'). The principle in *Biffa*'s case was that non-delegable duty of care in 'hazard' cases could only be applied to activities that were exceptionally dangerous in spite of the precautions that had been taken. It was Hemraj's submission that the excavation works in the instant case were not inherently so dangerous as to attract the application of the doctrine of non-delegable duty of care.

Held, unanimously dismissing the appeal and affirming the trial court's decision:

(1) The trial judge was correct in finding that Hemraj was under a non-delegable duty of care and was liable for negligence together with the third parties, albeit they were independent contractors. The excavation works on the public road was done illegally — in breach of s 40(1) of the Street, Drainage and Building Act 1974 and s 37(12)(a) of the Electricity Supply Act 1990 — without the requisite approvals from TNB, DBKL and IWK and without utility mapping being done to determine where underground utility cables and pipes lay. Utility mapping was specifically required in the insurance policy against risk of damage to surrounding property obtained by Hemraj for the excavation work. The trial judge correctly found that as the employer and owner of the sewerage connection work and the 'insured' under the policy, Hemraj had a contractual obligation to enquire with the relevant authorities about the 'exact position' of underground cables/pipes and to take all necessary steps to avoid damage to the same (see paras 45, 48–49 & 54).

(2) The trial judge found as a fact that Hemraj was aware that utility mapping had to be done and that the relevant permits had to be obtained before the excavation was done in order to minimise potential damage to underground installations. Hemraj not only allowed, but appeared to have applied pressure for the works to be done as soon as possible without the pre-requisite conditions being complied with. The trial judge correctly found that the parties at the excavation site had carried out their work 'blindly' not knowing whether, or where there were underground utility cables and pipes but fully aware that they could quite easily damage them if they were present (see paras 51–52 & 57).

(3) Hemraj contended that the trial judge had overlooked the principles established in the *Biffa* case and misapplied the non-delegable duty of care on Hemraj. But the factual matrix in *Biffa* was completely different from the facts in the instant case. *Biffa* did not involve unlawful and illegal excavation on a public road. The facts in the instant appeal fell squarely within the fact situation in *Tenaga Nasional Bhd v Syarikat*

Bekalan Air Selangor Sdn Bhd & Anor [2018] 1 MLJ 810 which the trial judge correctly applied and where it was held that excavation works on public roads was a hazardous activity which invited the application of the non-delegable duty of care on the employer (see paras 55–56).

(4) Even though TNB did not expressly use the words 'non-delegable duty of care' in its statement of claim, the essence of that duty was sufficiently pleaded. Negligence was alleged not only against Hemraj but also against its contractors, workers and agents and particulars of negligence against them were also pleaded. Hemraj should not have raised the pleading issue in the instant appeal hearing because it was not raised in the memorandum of appeal (see paras 21 & 23).

[Bahasa Malaysia summary

Perayu pertama ('Hemraj'), yang memiliki sebuah banglo, telah melantik kontraktor responden kedua ('R2') untuk menyambung sistem pembetungan banglo itu ke tangki pembetungan milik Indah Water Konsortium Sdn Bhd ('IWK'). Bagi membolehkan sambungan dibuat, sebahagian jalan awam di hadapan banglo itu terpaksa digali. Kerja-kerja penggalian ditugaskan kepada responden ketiga ('R3'), kontraktor pembetungan berlesen manakala responden keempat ('R4') mengupah operator backhoe dan menyelia penggalian. Kerja-kerja penggalian yang dijalankan tanpa mendapat kelulusan pra-syarat responden pertama ('TNB'), pihak berkuasa tempatan ('DBKL') dan IWK, telah merosakkan kabel berisi minyak bawah tanah 132KV milik TNB. TNB menyaman Hemraj dan pengarahnya (perayu kedua) dan, selepas perbicaraan, mendapatkan penghakiman terhadap Hemraj sebanyak RM3,110,445.09 serta kos pentadbiran untuk menggantikan kabel yang rosak. Tuntutan TNB terhadap perayu kedua telah ditolak tetapi mahkamah bicara membenarkan tuntutan indemniti perayu terhadap R2, R3 dan R4 yang telah ditambah sebagai pihak ketiga dalam saman itu dan yang telah dipertanggungjawabkan secara bersama dan berasingan bagi ganti rugi dan kos yang telah diawardkan terhadap Hemraj, bergantung apabila Hemraj membuat pembayaran penuh kepada TNB. Hakim bicara memutuskan bahawa Hemraj cuai dalam melanggar kewajipan berjaga-jaga tidak boleh diwakilkan dengan membenarkan kerja-kerja penggalian tanpa kebenaran itu dilakukan secara cuai oleh kontraktor di jalan awam sehingga merosakkan kabel bawah tanah TNB. Dalam rayuan ini terhadap keputusan itu, Hemraj berhujah bahawa ia tidak sepatutnya bertanggungjawab atas kecuaian R2, R3 dan R4 yang merupakan kontraktor bebas yang diambil bekerja oleh Hemraj. Hemraj juga berhujah bahawa TNB tidak pernah memplid terhadap kewajipan berjaga-jaga tidak boleh diwakilkan dan hakim bicara juga terkhilaf kerana gagal menggunakan prinsip dalam *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GMBH* [2009] 3 WLR 3242 ('kes Biffa'). Prinsip dalam kes *Biffa* ialah bahawa kewajipan berjaga-jaga tidak boleh diwakilkan dalam kes 'hazard' hanya boleh digunakan untuk aktiviti yang sangat

A berbahaya walaupun terdapat langkah berjaga-jaga yang telah diambil. Adalah hujahan Hemraj bahawa kerja-kerja penggalian dalam kes ini tidak secara pada dasarnya begitu berbahaya untuk menarik penggunaan doktrin kewajipan berjaga-jaga tidak boleh diwakilkan.

B **Diputuskan**, sebulat suara menolak rayuan dan mengesahkan keputusan mahkamah bicara:

(1) Hakim bicara adalah betul dalam mendapati bahawa Hemraj berada di bawah kewajipan berjaga-jaga tidak boleh diwakilkan dan
C bertanggungjawab atas kecuaian bersama dengan pihak ketiga, walaupun mereka adalah kontraktor bebas. Kerja-kerja penggalian di jalan awam itu dilakukan secara haram — melanggar s 40(1) Akta Jalan, Parit dan Bangunan 1974 dan s 37(12)(a) Akta Bekalan Elektrik 1990 — tanpa kelulusan yang diperlukan daripada TNB, DBKL dan IWK dan tanpa
D pemetaan utiliti dilakukan untuk menentukan di mana kabel dan paip utiliti bawah tanah terletak. Pemetaan utiliti diperlukan secara khusus dalam polisi insurans terhadap risiko kerosakan harta sekitar yang diperoleh Hemraj untuk kerja penggalian. Hakim bicara dengan betul mendapati bahawa sebagai majikan dan pemilik kerja penyambungan
E pembetungan dan 'diinsuranskan' di bawah polisi, Hemraj mempunyai kewajipan kontrak untuk bertanya dengan pihak berkuasa berkaitan tentang 'kedudukan tepat' kabel/paip bawah tanah dan mengambil semua langkah yang perlu untuk mengelakkan kerosakan (lihat perenggan 45, 48–49 & 54).

F (2) Hakim bicara mendapati fakta bahawa Hemraj sedar bahawa pemetaan utiliti perlu dilakukan dan permit yang berkaitan perlu diperolehi sebelum penggalian dilakukan untuk meminimumkan potensi kerosakan pada pemasangan bawah tanah. Hemraj bukan sahaja
G membenarkan, malah kelihatan memberi tekanan supaya kerja-kerja itu dilakukan secepat mungkin tanpa syarat pra-syarat dipatuhi. Hakim bicara dengan betul mendapati bahawa pihak-pihak di tapak penggalian telah menjalankan kerja mereka secara 'membuta tuli' tidak mengetahui sama ada, atau di mana terdapat kabel dan paip utiliti bawah tanah tetapi
H menyedari sepenuhnya bahawa ia boleh merosakkannya dengan mudah jika ia ada (lihat perenggan 51–52 & 57).

(3) Hemraj berhujah bahawa hakim bicara telah mengabaikan prinsip yang ditetapkan dalam kes *Biffa* dan menyalahgunakan kewajipan berjaga-jaga tidak boleh diwakilkan ke atas Hemraj. Tetapi matriks fakta dalam *Biffa*
I adalah berbeza sama sekali daripada fakta dalam kes ini. *Biffa* tidak melibatkan penggalian yang menyalahi undang-undang dan haram di jalan awam. Fakta dalam rayuan ini jatuh tepat dalam situasi fakta dalam *Tenaga Nasional Bhd v Syarikat Bekalan Air Selangor Sdn Bhd & Anor* [2018] 1 MLJ 810 yang digunakan oleh hakim bicara dengan betul dan

di mana ia diputuskan bahawa kerja penggalian di jalan awam adalah aktiviti berbahaya yang mengundang penggunaan kewajipan berjaga-jaga tidak boleh diwakilkan ke atas majikan (lihat perenggan 55–56).

(4) Walaupun TNB tidak secara jelas menggunakan perkataan 'non-delegable duty of care' dalam pernyataan tuntutannya, intipati kewajipan itu telah diplid secukupnya. Kecuaian didakwa bukan sahaja terhadap Hemraj tetapi juga terhadap kontraktornya, pekerja dan ejennya dan butir-butir kecuaian terhadap mereka turut diplid. Hemraj tidak sepatutnya membangkitkan isu pliding dalam pendengaran rayuan ini kerana ia tidak dibangkitkan dalam memorandum rayuan (lihat perenggan 21 & 23).]

Cases referred to

Batu Kemas Industri Sdn Bhd v Kerajaan Malaysia Tenaga Nasional Bhd [2015] 5 MLJ 52; [2015] 7 CLJ 849, CA (refd)

Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GMBH [2009] 3 WLR 3242, CA (distd)

CIMB Bank Bhd (formerly known as Bumiputera Commerce Bank Bhd) v Sebang Gemilang Sdn Bhd & Anor [2018] 3 MLJ 689, FC (refd)

Datuk Bandar Dewan Bandaraya Kuala Lumpur v Ong Kok Peng & Anor [1993] 2 MLJ 234; [1993] 3 CLJ 205, SC (refd)

Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal [2018] 3 MLJ 281; [2018] 3 CLJ 427, FC (refd)

Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal [2018] 1 MLJ 685; [2017] 10 CLJ 529, FC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Kee Boon Suan & Ors v Adventist Hospital & Clinic Services (M) & Ors and other appeals [2018] 5 MLJ 321, CA (refd)

Lee Kee v Gui See & Anor [1972] 1 MLJ 33 (refd)

Malaysia Land Properties Sdn Bhd v Waldorf & Windsor Joint Management Body [2014] 3 MLJ 467; [2014] 6 CLJ 821, CA (refd)

Mehrzad Nabavieh & Anor v Chong Shao Fen & Anor and another Appeal [2016] 3 MLJ 500; [2016] 5 CLJ 236, CA (distd)

Tenaga Nasional Bhd v Panareno Sdn Bhd (Vital Projects Sdn Bhd, third party and Semantra No-Dig Engineering Sdn Bhd, fourth party) [2019] 11 MLJ 795; [2019] 4 CLJ 239, HC (refd)

Tenaga Nasional Bhd v Syarikat Bekalan Air Selangor Sdn Bhd & Anor [2018] 1 MLJ 810; [2017] 6 CLJ 356, CA (folld)

Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd and another appeal [2018] 5 MLJ 561; [2018] 6 CLJ 683, FC (refd)

Woodland v Essex County Council [2013] 3 WLR 1227, CA (refd)

A *Yu Mea Lian v Government of Terrengganu & Ors* [1997] MLJU 252; [1997] 4 CLJ Supp 453, HC (refd)

Legislation referred to

Electricity Supply Act 1990 s 37(12)(a)
B Street, Drainage and Building Act 1974 s 40(1)

Appeal from: Suit No WA-22NCVC-826–12 of 2016 (High Court, Kuala Lumpur)

C *Manmohan Singh Kang (with Sunshine Devan) (Kang & Kang) for the appellant.*
Balvinder Singh Kenth (with Gurmesh Kaur) (Kenth Partnership) for the first respondent.
Rejinder Singh a/l Gurdev Singh (Rejinder Singh & Assoc) for the second and third respondents.
D *Periasamy a/l Karuppan (Periasamy & Co) for the fourth respondent.*

Azizah Nawawi JCA:

INTRODUCTION

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[1] This is an appeal against the decision of the learned High Court judge dated 1 October 2018 after a full trial. The High Court has found the first appellant to be in breach of its non-delegable duty of care in respect of the negligence of its independent contractors in carrying out unauthorised F excavation works on a public road for a sewerage connection, which caused damage to the first respondent's 132KV underground oil filled cable. Judgment was entered in favour of the first respondent in respect of the costs of cutting and capping the cable and installing a new replacement XLPE cable.

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[2] The learned High Court judge also held that the first appellant is entitled to claim full indemnity from the third parties for the damages and costs that the first appellant is liable to pay the first respondent. However, such liability is to accrue upon the first appellant making full payment of the judgment sum to H the first respondent.

[3] This appeal deals with the issue of liability only, whilst the issue on quantum of damages will be dealt with in Civil Suit No WA-22NCvC-863–11 of 2019, which is still pending in the High Court.

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[4] The second appellant's appeal was struck out on 19 August 2019.

[5] Having considered the appeal records and the submissions of all parties, we had unanimously dismissed the appeal and affirm the decision of the High

Court judge. These are the grounds of our decision. A

THE SALIENT FACTS

[6] The first respondent/plaintiff ('TNB') is a licensee under the Electricity Supply Act 1990 ('the ESA 1990') for the generation, transmission and distribution of electricity supply. B

[7] The first appellant ('Hemraj') was the owner of the bungalow having the postal address of No 3, Lorong Titiwangsa 4, Taman Tasik Titiwangsa, 53200 Kuala Lumpur ('the said bungalow'). The second appellant is a director of the first appellant. C

[8] TNB have a 132KV underground 'oil-filled' cable from PMU Kuala Lumpur City Centre to PMU Kampung Lanjut ('the underground cable') which passes through and along Lorong Titiwangsa 4, Taman Tasik Titiwangsa, ('the said site'). The path of the said underground cable runs across the front to the said bungalow, below the road surface. D

[9] Hemraj had appointed LCS Engineering Services ('LCS Engineering') as the engineer for the construction of the said House. In March 2013, LCS Engineering informed Hemraj that they would apply for the relevant approval from the Indah Water Konsortium Sdn Bhd ('IWK') to connect the sewerage connection from the said bungalow to the sewerage tank owned by IWK. E F

[10] For the purpose of the IWK connection, Hemraj had appointed the second respondent/first third party ('TP1') as the contractor to carry out the sewerage connection to the bungalow. The third respondent/second third party, Hiap Leck Construction & Trading ('TP2') was to carry out the excavation works, and the excavation works were carried out on 13 November 2013. G

[11] On or about 14 November 2013 at approximately 1:30am during a routine patrol, TNB workmen found evidence of soil excavation work being carried out at the site, which was fronting the said bungalow and found the said underground cable exposed with the presence of oil leaking out from the set underground cable. TNB workmen also found that the underground cable had been damaged by the excavation works, causing the oil leakage. The excavation works have been carried out without the prior knowledge and/or approval of TNB or Dewan Bandaraya Kuala Lumpur ('DBKL'). H I

[12] As a result of the excavation works and the damage to the underground cables, TNB sued Hemraj and the second appellant for the costs incurred to

replace the said underground cables for the sum of RM3,110,445.09 together with 25% administrative costs.

[13] The appellants took out third party proceedings for indemnity against three parties. The second respondent/TP1 was the contractor engaged to carry out the sewerage connection for the bungalow. The third respondent/TP2 was the licensed sewerage contractor to obtain the relevant approvals for the sewerage connection. The fourth respondent ('TP3') was the contractor who hired the backhoe operator which carried out the excavation works and caused the damage.

[14] After a full trial, the learned trial judge made the following orders:

(a) Hemraj is liable to TNB for the judgment sum of RM3,110,446.09 together with interest and cost;

(b) TNB's claim against the second appellant is dismissed with costs; and

(c) Hemraj's claim against the third parties is allowed and the third parties are jointly and severally liable for the damages and costs which were awarded against Hemraj, conditional upon Hemraj making payment to TNB.

THE DECISION OF THE HIGH COURT

[15] The learned trial judge made a finding that Hemraj is liable in negligence and was in breach of its non-delegable duty of care for the unauthorised excavation works on a public road that was carried out by its contractors. The trial judge made a finding of fact that the damages caused to TNB underground cables were due to the negligent excavation work done by Hemraj's contractors, who were brought into the suit as third parties by Hemraj. The trial judge then ordered the third parties to be jointly and severally liable for the damages and costs which were awarded against Hemraj, conditional upon Hemraj making payment to TNB.

OUR DECISION

[16] The central feature of appellate intervention is trite, that is to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. This had been explained by the Federal Court in the case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1, where the Federal Court held as follows:

> [14] In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention, ie *to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law*

and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention, *ie that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal.* This is consistent with the established plainly wrong test. (Emphasis added.)

[17] In another case, the Federal Court in *CIMB Bank Bhd (formerly known as Bumiputera Commerce Bank Bhd) v Sebang Gemilang Sdn Bhd & Anor* [2018] 3 MLJ 689 held as follows:

[38] The issue of knowledge of the equitable assignment is entirely a question of facts. Both the courts below concluded that the appellant had knowledge of the equitable assignment based on the facts and circumstances of the case. *It is trite law that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its judicial decision or there has been no or insufficient judicial appreciation of evidence* (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1). (Emphasis added.)

[18] Bearing in mind the above cases, we will now deal with the issues raised by the parties.

[19] Hemraj had raised three issues in this appeal:

(i) that non-delegable duty of care was not pleaded by TNB;

(ii) that the learned trial judge has erred when he imposed non-delegable duty of care on Hemraj in respect of the negligence of its independent contractors; and

(iii) that the trial judge has erred in failing to apply the principle in *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GMBH* [2009] 3 WLR 3242 ('Biffa').

Issue (i) — Whether the doctrine of non-delegable duty of care was specifically pleaded

[20] The first issue raised by Hemraj is that the doctrine 'non-delegable duty of care' was not pleaded by TNB. Hemraj relied on the case of *Kee Boon Suan & Ors v Adventist Hospital & Clinic Services (M) & Ors and other appeals* [2018] 5 MLJ 321 where the Court of Appeal held that a claim made under the doctrine of non-delegable duty of care must be expressly pleaded.

[21] However, we take note that this pleading issue was not raised in either the 'Memorandum Rayuan' dated 21 December 2018 or the 'Memorandum Rayuan Tambahan' dated 15 February 2019. Therefore we are of the considered opinion that the issue on pleading should not have be raised before this court. Reference is made to the decision of this court in *Malaysia Land Properties Sdn Bhd v Waldorf & Windsor Joint Management Body* [2014] 3 MLJ 467; [2014] 6 CLJ 821, where this court held as follows:

> [33] The appellant did not include the lack of locus as a ground in its memorandum of appeal and neither did it apply to amend the memorandum of appeal to do so. There is a plethora of weighty decisions that an appeal court will not allow an appellant to argue a ground that has not been pleaded in its memorandum of appeal as a matter of essential justice to the court below and to the respondent who would have to defend a judgment of the High Court on an unpleaded ground of appeal ...

[22] In any event, it is to be noted that only the appellants have been sued for negligence by TNB. However, the particulars of negligence was also directed against the appellants' contractors, workers and/or agents. The claim for negligence is found in para 18 of the statement of claim ('SOC'):

> TNB menyatakan bahawa kerugian dan kerosakan kabel bawah tanah tersebut telah disebabkan oleh kecuaian, pengabaian sengaja dan/atau pelanggaran kewajipan oleh Defendan Pertama dan Defendan Ke-2 dan/atau kontraktor-kontraktor, pekerja-pekerja atau agen-agen mereka.
>
> *Butir-butir Kecuaian*
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> (i) Kegagalan untuk mengambil apa-apa atau apa-apa langkah wajar untuk memaklumkan TNB sebelum memulakan kerja-kerja penggalian untuk memastikan kewujudan kabel bawah tanah tersebut dan untuk mengenal pasti lokasi tempat yang sama di tapak;
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> (ii) Kegagalan untuk memohon dan/atau mendapatkan apa-apa kelulusan dan/atau permit yang perlu sebelum memulakan kerja-kerja penggalian;
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> (iii) Kegagalan untuk mengambil sebarang langkah berjaga-jaga dan langkah-langkah yang munasabah dan/atau wajar untuk memastikan bahawa kerja-kerja penggalian telah dijalankan dengan cara yang tidak mendatangkan apa-apa bahaya kepada keselamatan dan integriti kabel bawah tanah tersebut;
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> (iv) Kegagalan untuk memberi perhatian yang sewajarnya dan/atau sepatutnya kepada kehadiran kabel bawah tanah tersebut semasa menjalankan kerja-kerja penggalian; dan
>
> (v) Menjalankan kerja-kerja pengalian tersebut dengan cara yang menimbulkan satu risiko dan bahaya kepada keselamatan dan integriti kabel bawah tanah tersebut.

[23] Even though the words 'non-delegable duty of care' was not expressly pleaded in para 18 of the SOC, we find that the essence of the duty was

sufficiently pleaded. Negligence was alleged not only against Hemraj but also against Hemraj's 'kontraktor-kontraktor, pekerja-pekerja dan agen-agen'. Particulars of negligence against Hemraj and/or its contractor, its servants and/or agents were also pleaded. Support for this proposition can be found from the decision of the Federal Court in *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* [2018] 3 MLJ 281; [2018] 3 CLJ 427, where Md Raus Sharif CJ said as follows:

> [109] It was contended before us that the issue of non-delegable duties should not be allowed to be raised, since the plaintiff had not pleaded direct liability on the hospital's part for negligence. From a careful reading of the pleadings, this is not the case. We note that the plaintiff had pleaded particulars of the hospital's own negligence in the statement of claim; in his reply to the hospital's defence, the plaintiff had also alluded to the hospital's duty of care to the plaintiff to ensure that a competent standard of practice is exercised during the operation. Since *'the nature of a non-delegable duty is, in essence, a positive duty to ensure that reasonable care is taken' (Dr Kok Choong Seng), we find that the essence of a non-delegable duty has been sufficiently pleaded*. (Emphasis added.)

[24] In fact, the words 'non-delegable duty of care' was also not expressly pleaded in the case of *Tenaga Nasional Bhd v Syarikat Bekalan Air Selangor Sdn Bhd & Anor* [2018] 1 MLJ 810; [2017] 6 CLJ 356, where the Court of Appeal made a finding on non-delegable duty of care against Syarikat Bekalan Air Selangor Sdn Bhd. What was pleaded were the particulars of negligence purportedly committed by the defendants, either by themselves or their servants, agents and/or contractors. The court made reference to the pleaded case on negligence in para 5 of the statement of claim:

> 5. On or around 10.04.2008 to 18.04.2008, the Defendants and/or each of them, either by themselves or their servants, agents and/or contractors, had intentionally, recklessly, negligently and/or by omission trespassed onto and/or negligently caused damage to a part of the Plaintiff's 132KV underground cables running from Kg. Lanjut, Kuala Lumpur to the Titiwangsa Main Intake Stations at Kg. Air Panas. ('the Plaintiff's Cables').
>
> Particulars of negligence
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> The Defendants and/or each of them either by itself or its servants, agents and/or contractors:
>
> (i) Failed to take reasonable steps to enquire whether there were any underground cables in the vicinity of the intended excavation works prior to commencing the same.
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> (ii) Failed to detect and ascertain the existence and placement of the Plaintiff's Cables before carrying out excavation works in the proximity of the Plaintiff's Cables.
>
> (iii) Failed to take heed of a notice dated 16.04.2008.

(iv) Failed to engage and employ competent, professional and careful servants and contractors to supervise the carrying out of the excavation works in the proximity of the Plaintiff's Cables.

(v) Carried out excavation works in the proximity of the Plaintiff's Cables without exercising due care.

(vi) Failed to take all reasonable precautionary steps before and while carrying out excavation works in the proximity of the Plaintiff's Cables.

(vii) The Plaintiff will further rely on the damage to the Plaintiff's Cables as evidence of negligence ...

Issue (ii) Whether the trial judge was correct to impose non-delegable duty of care on Hemraj

The doctrine of non-delegable duty of care

[25] The general principle is that an employer is not liable for any tort committed by his independent contractor. An employer may however be liable for the tort committed by his independent contractor if the employer is deemed to have committed the tort himself. This is an exception to the general rule, and the employer is liable where the duty is held to be non-delegable.

[26] In *Datuk Bandar Dewan Bandaraya Kuala Lumpur v Ong Kok Peng & Anor* [1993] 2 MLJ 234; [1993] 3 CLJ 205, the Supreme Court through the judgment of Peh Swee Chin SCJ (later FCJ), applied the concept of non-delegable duty of care and this is what he said at pp 239–240 (MLJ); 208–209 (CLJ):

> If the independent contractor, that is, the third party in this case was not involved, then there could not be the slightest doubt that the Datuk Bandar, ie, the defendant was liable. However, it was repeatedly submitted that the defendant was not liable for default or negligence of his independent contractor whom the defendant chose and whose competence was not disputed by any party. Could therefore the blame for the plaintiff's misfortune be shifted on to the shoulders of the defendant's independent contractor in the circumstances of this case?
>
> *While the rule that an employer of an independent contractor is not liable for the default or negligence of such contractor no doubt exists, there are exceptions, and it is outside the province of this judgment to elaborate all the exceptions but only briefly to deal with them except those which are directly concerned with the instant case.*
>
> First exception is where an employer has not exercised care in selecting a competent contractor as was much pressed in argument in the present case. *Second exception is a group of cases or situations when the duty to take care is said to be 'non- delegable'. A non-delegable duty to take care means in effect that the employer would have to see to it that such duty of care is exercised, whether by his contractor or not, otherwise he would be equally liable as the contractor, in addition, in most cases, to the liability of his contractor.* Such non-delegable duty exists in the case of work causing withdrawal of

support to neighbour's land, see *Bower v Peat* [1876] 1 QBD 321 *work done on a highway,* see *Tarry v Ashton* [1876] 1 QBD 314 cases of a master's duties for his servant's safety at common law, see *Wilsons & Clyde Coal Co v English* [1930] AC 57 cases of strict liability and finally cases of statutory duty imposed on certain categories of persons.

The last two mentioned exceptions require elaboration as they have considerable relevance to our instant case.

The exception in regard to cases of strict liability above mentioned refers to cases of such strict liability at common law, such as the rule in Rylands v. Fletcher. The exception covers, inter alia, all cases involving extra hazardous acts or omissions, or situations created by them, which all involve special danger to others, please see the reference to them eg, in *Salsbury v Woodland* [1970] 1 QB 324, *such as damage by fire, see Honeywill Stein Ltd v Larkin Brothers Ltd* [1934] 1 KB 191 *so that an employer of an independent contractor, to repeat, cannot escape liability by delegating the work to such independent contractor.*

In our view, the situation described earlier as facing the plaintiff was a situation created by such an extra hazardous act or omission involving special danger to such users of that lift. The defendant could not escape such liability entrusted to or by entrusting to the third party. That is why we confirmed the judgment of the High Court against the defendant in favour of the plaintiff for this reason alone. (Emphasis added.)

[27] In *Tenaga Nasional Bhd v Syarikat Bekalan Air Selangor Sdn Bhd & Anor*, the Court of Appeal held as follows:

[16] *In a normal negligence action for damages, the necessity to prove fault on the part of a defendant is a condition precedent to affix liability. That is not the case when an action is premised on a contention that the defendant owes a 'non-delegable' duty to a plaintiff. In such a claim, the plaintiff is required to establish, in the circumstance of the case, that the defendant has a duty to ensure that another party takes reasonable care in its discharge of its duty of care. Under such non-delegable duty concept, a defendant cannot plead as a defence that the other party is an independent contractor not under its control*. Put it in another way, the fault of the defendant is irrelevant; what is relevant is that the defendant has to ensure that the other party has performed its task with reasonable care. If the other party had been negligent in its task, the defendant would be liable for such negligence. (Emphasis added.)

[28] In *Mehrzad Nabavieh & Anor v Chong Shao Fen & Anor and another Appeal* [2016] 3 MLJ 500; [2016] 5 CLJ 236 CA, Justice Nallini Pathmanathan (now FCJ) said this:

[32] *Non-delegable duties are exceptions to the general principle, that employers are not liable for the acts of independent contractors.* According to *Clerk & Lindsell* (above), *non-delegable duties are dependent upon a finding that the employer is in breach of some duty personally owed to the claimant. If the law imposes a strict duty on the employer, then his duty cannot be discharged by delegating work to an independent contractor.* There are statutory as well as common law non-delegable duties. However, for our

purposes we will consider common law non-delegable duties since the parties did not invoke any statute which imposed non-delegable duties on the first two defendants.

[33] *The textbook author acknowledged that it is difficult to know when non-delegable duties exist at common law, but submitted that a telling feature of the leading cases is that there is nearly always an affirmative duty for which the defendant has assumed responsibility*. (Emphasis added.)

The application and categories of the non-delegable duty of care

[29] In *Tenaga Nasional Bhd v Syarikat Bekalan Air Selangor Sdn Bhd & Anor*, the Court of Appeal referred to the an English case of *Woodland v Essex County Council* [2013] 3 WLR 1227 where the court held that there are two broad categories in which non-delegable duty has been held to exist. Lord Sumption had this to say under what circumstances a non-delegable duty will be imposed:

[6] English law has long recognised that non-delegable duties exist, but it does not have a single theory to explain when or why. *There are, however, two broad categories of case in which such a duty has been held to arise. The first is a large, varied and anomalous class of cases in which the defendant employs an independent contractor to perform some function which is either inherently hazardous or liable to become so in the course of his work. The early cases are concerned with the creation of hazards in a public place, generally in circumstances which apart from statutory authority would constitute a public nuisance*: see *Pickard v Smith* (1861) 10 CBNS 470; (1861) 142 ER 535 (which appears to be the first reported case of a non-delegable duty), *Penny v Wimbledon Urban DC* [1898] 2 QB 212 and *Holliday v National Telephone Co* [1899] 2 QB 392; [1895-9] All ER Rep 359. In *Honeywill and Stein Ltd v. Larkin Bros (London's Commercial Photographers) Ltd* [1934] 1 KB 191; [1933] All ER Rep 77, the principle was applied more broadly to 'extra-hazardous' operations generally. Many of these decisions are founded on arbitrary distinctions between ordinary and extraordinary hazards which may be ripe for re-examination. *Their justification, if there is one, should probably be found in a special public policy for operations involving exceptional danger to the public.* But their difficulties do not need to be considered further on these appeals, because teaching children to swim, while it unquestionably involves risks and calls for precautions, is not on any view an 'extra-hazardous' activity. It can be perfectly satisfactorily analysed by reference to ordinary standards of care.

[7] *The second category of non-delegable duty is, however, directly in point. It comprises cases where the common law imposes a duty upon the defendant which has three critical characteristics. First, it arises not from the negligent character of the act itself but because of an antecedent relationship between the defendant and the claimant. Second, the duty is a positive or affirmative duty to protect a particular class of persons against a particular class of risks, and not simply a duty to refrain from acting in a way that foreseeably causes injury. Third, the duty is by virtue of that relationship personal to the defendant. The work required to perform such a duty may well be delegable, and usually is. But the duty itself remains the defendant's. Its delegation makes no difference to his legal responsibility for the proper performance of a duty which is in law his own*. In these cases, the defendant is assuming a liability analogous to that assumed by a person who

contracts to do work carefully. The contracting party will normally be taken to contract that the work will be done carefully by whomever he may get to do it: see *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556 at 566; [1980] AC 827 at 848 (Lord Diplock). The analogy with public services is often close, especially in the domain of hospital treatment in the National Health Service or education at a local education authority school, where only the absence of consideration distinguishes them from the private hospital or the fee-paying school performing the same functions under contract. In the law of tort, the same consequence follows where a statute imposes on the defendant personally a positive duty to perform some function or to carry out some operation, but he performs that duty by entrusting the work to someone else for whose proper performance he is legally responsible. In *Morris v. C W Martin & Sons Ltd* [1965] 2 All ER 725 at 730-732; [1966] 1 QB 716 at 725-728, Lord Denning MR analysed the liability of a non-contractual bailee for reward in similar terms, as depending on his duty to procure that proper care w.as exercised in the custody of the goods bailed. (Emphasis added)

Category 1 of non-delegable duties

(a) Hazardous cases

[30] The case of *Datuk Bandar Dewan Bandaraya* falls within the genre of the 'hazardous cases'. In that case, the plaintiff fell down a lift shaft in a block of flats owned by the defendant. After the doors of the lift had opened, the plaintiff stepped into it but found that the lift was not where it should be. There were no signs and this was attributed to the maintenance contractors. The court held that in such a situation where there was an extra hazardous act or omission involving special danger to such users of that lift, DBKL could not escape such liability entrusted to the independent contractors.

(b) Hazardous and highway cases

[31] In *Tenaga Nasional Bhd v Syarikat Bekalan Air Selangor Sdn Bhd & Anor*, the court finds that the factual matrix of the case falls into the first category of hazardous and highway cases. In that case, TNB had sued SYABAS and its contractor for negligently damaging a section of its high-voltage underground cables running from Kg Lanjut, Kuala Lumpur to the Titiwangsa Main Intake Stations at Kg Air Panas, while doing excavation work. The contractor in turn claimed indemnity from its insurer and its subcontractor. After the trial, the High Court held the contractor fully liable and allowed the contractor's claim against the subcontractor and dismissed the claims against SYABAS. The High Court held that SYABAS was not vicariously liable for contractor's act. In the appeal against the High Court's decision, TNB argued that the contractual relationship between the respondents was irrelevant to its case and the trial court should instead have considered whether SYABAS owed TNB a

non-delegable duty to ensure the contractor carried out its job with reasonable care.

[32] On appeal, the Court of Appeal allowed TNB's appeal and held SYABAS owed a non-delegable duty of care and had to ensure that its contractors performed their task with reasonable care. The court had applied the principle on non-delegable duty where the excavation works were executed on a public road making such works hazardous to the public. The court had also referred to the judgment of Lord Sumption in *Woodland*, where His Lordship recognised that 'there were two other instances where a non-delegable duty may arise and they were described as the 'highway and hazard cases'. The highway cases were concerned with inherently hazardous operations or dangers on the public highway, whilst the hazard cases involved the engagement of independent contractors to undertake inherently hazardous works or extra-hazardous operations.

[33] In *Batu Kemas Industri Sdn Bhd v Kerajaan Malaysia Tenaga Nasional Bhd* [2015] 5 MLJ 52; [2015] 7 CLJ 849, the Court of Appeal has invoked the principle of non-delegable duty against the Government of Malaysia for the acts of its independent contractor for causing damage to TNB underground cables at a project on the highway. In this case, the plaintiff was operating a factory producing calcium silicate bricks. Pursuant to a supply of electricity contract, the second defendant Tenaga Nasional Bhd (TNB) supplied electricity to the plaintiff. Jabatan Kerja Raya (JKR) had embarked on constructing a rest and recreation area on the Ipoh — Kuala Lumpur Highway. JKR had appointed Markas Perdana Sdn Bhd as the contractor to execute the project works. The contractor, whilst carrying out the project works at the project site struck an underground cable belonging to TNB which was connected to the plaintiff's factory. The cable was damaged, interrupting the supply of electricity to the plaintiff's factory. Consequently, the operations in the plaintiff's factory ceased and the plaintiff's equipment were damaged. The plaintiff claimed damages against the Government of Malaysia and TNB for negligence and for breach of contract against the second defendant. The court has applied the decision of the Federal Court in *Datuk Bandar Dewan Bandaraya* and held the Government of Malaysia liable for the acts of its independent contractor for causing damage to TNB underground cables at a project on the highway. The court held as follows:

> [22] Accordingly, *we are constrained to hold that the first defendant owed a non-delegable duty of care to ensure that the project works done would not injure third parties. And in the discharge of that duty, the first defendant is obliged to take all necessary precautions; in the context of the present case, to obtain sufficient information on the project site and the potential hazards such as the existence of underground cables*. (Emphasis added.)

[34] Even though TNB's appeal was allowed in part by the Federal Court in *Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd and another appeal* [2018] 5 MLJ 561; [2018] 6 CLJ 683, the Court of Appeal's decision on on-delegable duty of care was not challenged in the Federal Court.

(c) Dangerous activities on or near a highway

[35] Another area where the principle of non-delegable duty was invoked is where there are dangerous activities on or near a highway. In *Yu Mea Lian v Government of Terrengganu & Ors* [1997] MLJU 252; [1997] 4 CLJ Supp 453, the plaintiff suffered injuries when their car plunged into a culvert on the public road. The defendant had employed a contractor to do the drainage works at the highway. Hence the defendant denied liability and claimed that the works was done by an independent contractor. The court held that the defendant was liable as excavating a road for the purpose of constructing a culvert amounted to the creation of a dangerous situation and therefore the responsibility to provide safety cannot be delegated.

(d) Fire or other hazardous activities

[36] Other cases which attract the principle of non-delegable duty are damages caused by fire or other hazardous activities. In *Lee Kee v Gui See & Anor* [1972] 1 MLJ 33, the court held that the defendants were liable for the negligence of their independent contractor who set fire to some branches and tree trunks on the defendant's land and left the fire unattended so that it spread to and destroyed the property of the plaintiff. The court held that the duty to prevent the fire from spreading is non-delegable and it is irrelevant that the performance was given to an independent contractor, whose negligence causes the damage.

Category 2 of non-delegable duty: Under common law

[37] In *Tenaga Nasional Bhd v Panareno Sdn Bhd (Vital Projects Sdn Bhd, third party and Semantra No-Dig Engineering Sdn Bhd, fourth party)* [2019] 11 MLJ 795; [2019] 4 CLJ 239, the defendant notified TNB that they will be commencing the laying of water pipes for the proposed serviced apartments on Lot 5787, Jalan Damanlela, Kuala Lumpur. TNB replied that the pipe works could affect the safety of the cable and that the defendant must stop the said pipe works until the exact site location of the cable was ascertained. Several more correspondences were exchanged followed by a site visit and the defendant submitted to TNB a proposed method of conducting the pipe works. TNB replied, by its letter dated 19 August 2010, inter alia, that the defendant's application to undertake the pipe works was not approved until all the conditions stipulated in the letter had been agreed to and complied with in

full. The defendant agreed to comply with all the conditions in TNB's letter of 19 August 2010. It was TNB's case that the defendant failed to comply with the terms and conditions of the TNB 19 August 2010 letter, which resulted in the damage to the cable which in turn resulted in disruption to the electricity supply transmitted via the cable. In allowing TNB claim, the learned judicial commissioner held as follows:

(i) Non-delegable Duty Of Care

[114] Further, I find that the defendant owes the plaintiff a non-delegable duty of care. I find that the non-delegable duty owed by the defendant to the plaintiff falls within the second category of non- delegable duty identified by Lord Sumption in *Woodland v Essex County Council* [2014] 1 All ER 482, which is as follows:

> [7] The second category of non-delegable duty is, however, directly in point. It comprises cases where the common law imposes a duty on the defendant which has three critical characteristics. First, it arises not from the negligent character of the act itself but because of an antecedent relationship between the defendant and the claimant. Second, the duty is a positive or affirmative duty to protect a particular class of persons against a particular class of risks, and not simply a duty to refrain from acting in a way that foreseeably causes injury. Third, the duty is by virtue of that relationship personal to the defendant. The work required to perform such a duty may well be delegable, and usually is. But the duty itself remains the defendant's. Its delegation makes no difference to his legal responsibility for the proper performance of a duty which is in law his own. In these cases, the defendant is assuming a liability analogous to that assumed by a person who contracts to do work carefully. The contracting party will normally be taken to contract that the work will be done carefully by whomever he may get to do it: see *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 848 (Lord Diplock). (Emphasis added.)

[115] Similar to the defendant in *Woodland v Essex County Council*, (i) the defendant's non-delegable duty to TNB arose because of the antecedent relationship between the defendant and TNB ie, the agreement to comply with the terms and conditions in TNB's 19 August 2010 letter; (ii) the duty is a positive duty to protect TNB's 132KV cable and the public, who are users of electricity distributed/transmitted via the cable; and (iii) the duty is by virtue of that relationship, which is personal to the defendant.

[116] The defendant was under a duty to find the exact location of the cable before commencing the pipe works. While it can delegate the work to Vital Projects and Semantra, the duty to find the exact location of the cable remains the defendant's pursuant to the conditions of the TNB's 19 August 2010 letter.

[117] The principles of non-delegable duty established in *Woodland v Essex County Council* was followed with approval by the Court of Appeal in *Tenaga Nasional Bhd v Sykt Bekalan Air Selangor Sdn Bhd & Anor* [2018] 1 MLJ 810; [2017] 6 CLJ 356. In that case, TNB sued Syarikat Bekalan Air Selangor Sdn Bhd ('SYABAS') and its contractor for negligently damaging a section of its 132KV underground cables while doing excavation work. The Court of Appeal allowed TNB's appeal and held that SYABAS owed a non- delegable duty of care and had to ensure that its contractors performed their task with reasonable care. David Wong JCA (as His

Lordship then was) in delivering the judgment of the Court of Appeal held that:

> [16] In a normal negligence action for damages, the necessity to prove fault on the part of a defendant is a condition precedent to affix liability. That is not the case when an action is premised on a contention that the defendant owes a 'non-delegable' duty to a plaintiff. In such a claim, the plaintiff is required to establish, in the circumstance of the case, that the defendant has a duty to ensure that another party takes reasonable care in its discharge of its duty of care. Under such non-delegable duty concept, a defendant cannot plead as a defence that the other party is an independent contractor not under its control. Put it in another way, the fault of the defendant is irrelevant, what is relevant is that the defendant has to ensure that the other party has performed its task with reasonable care. If the other party had been negligent in its task, the defendant would be liable for such negligence. (Emphasis added.)

[118] Like in this present case, SYABAS in *TNB v Syabas* failed to do the pilot trenching required by TNB to locate its 132KV cable before commencing work. His Lordship observed that:

> [20] It is plain and obvious that any excavation work by the first respondent (SYABAS) would likely encounter the underground cables of the appellant (TNB). So it is not surprising, that the first respondent was required by s 40 of the Street, Drainage and Building Act 1974 to obtain a permit from Dewan Bandaraya Kuala Lumpur to carry out such excavation work. Such permit was obtained by the first respondent for the relevant works (see D8). Not insignificant in the aforesaid permit, there was a specific requirement on the part of the first respondent to obtain the permission from the appellant prior to commencement of work and more importantly to do pilot trenching in concert with the appellant to locate the exact position of the underground cables so as to avoid any damage to the same. However as pointed out by counsel for the appellant, no such pilot trenching was done by the first respondent or the second respondent.

[38] In medical negligence cases, the courts have held that where a hospital is held to owe a non-delegable duty of care to its patient to ensure that reasonable care is taken in his treatment, the hospital may be held liable to the patient if the duty is breached, regardless to whom performance of that duty is delegated. The second category of non-delegable duty identified by Lord Sumption in *Woodland v Essex County Council* was applied by the Federal Courts in *Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal* [2018] 1 MLJ 685; [2017] 10 CLJ 529 and *Dr Hari Krishnan & Anor v Megat Noor Ishak Megat Ibrahim & Anor and another appeal*.

PRESENT APPEAL

[39] In the present appeal, Hemraj is not disputing that the third parties were negligent. Hemraj is also not disputing that the third parties' negligent works caused damage to TNB's 132KV cables. The only issue raised by Hemraj

A is against the learned trial judge finding on non-delegable duty of care, which Hemraj contends was a misdirection of the law. Hemraj took the position that the third parties are independent contractors, and that as their employer Hemraj cannot be held liable for the negligence of the independent contractors.

B

[40] The learned judge findings on non-delegable duty of care can be found in paras [132] and [134]:

> [132] In my view, there was clear negligence and breach of duty of care by D1 through its engineer (LCS Engineering) and contractors (the third parties) in carrying out the excavation work which resulted in the damage to the underground cable has been established. I should add that LCS Engineering, which was appointed verbally by D1 and D2 to plan and do the drawings for the sewage connection, showed a complete lack of regard for its duty to conduct necessary enquiries and tests to determine the presence of underground cable utility cables.
>
> ...
>
> [134] Based on the above facts and circumstances, I am impelled to view that D1 was under a non-delegable duty of care and is liable for negligence together with the other tortfeasors, namely the third parties, albeit that they are independent contractors. The immediate tortfeasor is of course TP3, who hired a back-hoe operator and supervised the excavation. But TP1 must also be held liable as he ought to have done utility mapping or should have insisted that LCS Engineering should procure the utility Map from TNB. At any rate, TP1 knew that the DBKL excavation permit had not been obtained. Yet he asked the TP3 to go ahead as he took refuge in the fact that there was insurance cover if anything should go wrong.

C D E F

[41] We are of the considered opinion that there is no misdirection by the learned trial judge with regard to his findings on non-delegable duty of care. We find that the learned trial judge had correctly applied the case of *Tenaga Nasional Bhd v Syarikat Bekalan Air Selangor Sdn Bhd & Anor*, where the Court of Appeal had applied the principle on non-delegable duty where the excavation works were executed on a public road making such works hazardous to the public.

G

H

[42] The same factual matrix is present in the present appeal as the excavation works were also executed on a public road, involving not just exceptional danger to the public but damages and/or inconveniences to the neighbourhood due to damage to the underground cables. Hemraj had appointed LCS Engineering and the third parties to carry out the exaction works on public road. Unlike *Tenaga Nasional Bhd v Syarikat Bekalan Air Selangor Sdn Bhd & Anor*, there was no written contracts between Hemraj and LCS Engineering and the third parties. The excavation works, which was executed without the required permits, had damaged TNB Cables. We are of the considered opinion that the duty imposed on Hemraj is a positive duty to

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protect TNB underground cables and subsequently to the public, who are users of electricity distributed/transmitted via the underground cable. As such, we find that this appeal falls within Category 1 of the doctrine of non-delegable duty of care, in relation to highway and hazard cases.

[43] Learned counsel for Hemraj had sought to distinguish the case of *Tenaga Nasional Bhd v Syarikat Bekalan Air Selangor Sdn Bhd & Anor* on the basis that SYABAS is a public entity corporation, whereas Hemraj is merely a small company. We find no basis for such a distinction as the Court of Appeal in *Tenaga Nasional Bhd v Syarikat Bekalan Air Selangor Sdn Bhd & Anor* clearly held that one of the determining factors was that the excavation works were executed on a public road making such works hazardous to the public.

[44] Added to that, the findings of the learned trial judge on the issue of non-delegable duty of care is supported by the factual matrix of the case. The learned trial judge found as a fact that Hemraj was aware that the excavation works on a public road required permits from both DBKL and IWK. The requirement of such permits must surely indicate the seriousness of excavating on public roads that can pose a big risk and a hazard to public utilities or to the public at large. The learned trial judge also made a finding of fact that Hemraj was aware that the excavation works were carried out without the requisite permits from DBKL, IWK and TNB.

[45] With regard to the permit from DBKL, the application was only submitted one day before the incident, on 12 November 2013, and as at 13 November 2013 (the day of the incident) no permit had been issued. The permit was only issued on 24 February 2014. Since the second appellant had signed the application on behalf of Hemraj, he obviously knew that the excavation permit had not yet been issued when the excavation started on 13 November 2013. Such an illegal act is contrary to sub-s 40(1) of the Street, Drainage and Building Act 1974. In *Tenaga Nasional Bhd v Syarikat Bekalan Air Selangor Sdn Bhd & Anor*, Justice David Wong JCA (later CJSS) held that SYABAS had failed to do the pilot trenching required by TNB to locate its 132KV cable before commencing work. His Lordship observed that:

> [20] It is plain and obvious that any excavation work by the first respondent (SYABAS) would likely encounter the underground cables of the appellant (TNB). So it is not surprising, that the first respondent was required by s 40 of the Street, Drainage and Building Act 1974 to obtain a permit from Dewan Bandaraya Kuala Lumpur to carry out such excavation work ...

[46] Therefore Hemraj's contractors commenced the excavation work illegally, without the DBKL permit. TP3 gave evidence that the second

A appellant was at the Site on 13 November 2013 during the excavation works and saw what was going on. As such Hemraj was aware that the excavation works had started without a permit.

B **[47]** The excavation works was also done without the IWK permit. Hemraj had obtained approval from IWK for the proposed sewerage connection by letters dated 3 June 2013 and 30 August 2013 through LCS Engineering. IWK confirmed that the approval was subject to Hemraj complying with the conditions in the letters, which imposed various obligations on the developer/consultant/contractor. However, the pre-conditions had not been C met, particularly the PDC6 Form which was only submitted to IWK on 26 November 2013, well after the excavation works on 13 November 2013. Indeed in IWK letter dated 28 November 2013, IWK took the position that both Hemraj and LCS Engineering were responsible for the damage to the cable caused by the sewerage connection work.

D

[48] There was also a clear breach of s 37(12)(a) of the ESA as no approval had been obtained from TNB prior to the excavation. This provision imposes liability on any person carrying out any activity in the vicinity of any electrical E installation of TNB without TNB' approval and consent. Hence, the trial judge was correct in his findings that Hemraj had a duty to inquire with TNB about the location of the underground cables before commencing the excavation works.

F **[49]** The learned trial judge also made a finding that there was no utility mapping done to identify underground utilities at the site. This was specifically required in the insurance policy obtained by Hemraj for the excavation work on a public road. In fact, DW7 from LCS Engineering confirmed that this was a requirement for excavation on a public road. Therefore, the learned trial G judge was correct in his findings that that as the employer and owner of the sewerage connection work and the 'insured' in the policy, Hemraj was under a contractual obligation as per the special condition of the policy insurance to enquire with the relevant authorities about the 'exact position' of cables/pipes and to take all necessary steps to avoid damage to the same.

H

[50] As such, we are of the considered opinion that the learned trial judge is correct in his finding that the non-delegable duty of care may also be inferred from the fact that Hemraj had taken insurance cover to insure against the risk of damage to the 'surrounding properly'.

I

[51] Based on the failure to obtain the requisite approvals and permits from the relevant authorities, coupled with the failure to conduct utility mappings, we find that the trial judge did not commit any appealable error in his findings in paras [104]–[105] of the grounds of judgment:

> [104] Hence, all parties who were working at the site were carrying out their work 'blindly' so to speak. They were totally clueless as to what was lying beneath the road surface and/or what they might hit or damage when carrying out the excavation. I might add that TP1 and TP3 were quite oblivious or non-chalant to the dangers that were lurking beneath the surface of the road.
>
> [105] This is underscored by the fact that TP3 said he raised his concerns with the TP1 about the possibility of damaging something beneath the road surface and the latter told him not to worry as there was insurance cover, if anything should go wrong. TP1 and TP3 were therefore fully aware of the possibility of the presence of underground cables and that these could be damaged due to the excavation ...

[52] Another important finding of the trial judge is that there must have been some pressure from Hemraj for the sewerage connection work to be completed quickly, as the work within the bungalow had been completed by 10 November 2013. This explained why the excavation work was done without the requite approval from the relevant authorities. In para [118] of the grounds of judgment, the learned trial judge made the following findings:

> It is not disputed by all parties that the excavation work on the road fronting the house started on 13th November 2013. And, the excavation work within the compound of the house took place on 10th November, 2013. *Quite obviously, there must have been some pressure or at least an expectation that the work would be completed quickly*. (Emphasis added.)

[53] We are also of the considered opinion and we agree with learned counsel for TNB that another relevant consideration is that there were no official letters of appointment for the appointment of LCS Engineering and any of the third parties. The appointments were all made verbally by the second appellant on behalf of Hemraj. No evidence was offered to explain the nature of the appointments and the job scope for each party to support Hemraj's contention that the duty of care was delegable. The learned trial judge's finding on this issue can be found at para [117] of the GoJ which reads:

> ... the general rule is that an employer is not liable for the negligent acts of his independent contractor ... But as with all general rules there are (and must be) exceptions. Here the situation is quite different from the ordinary circumstances where an employer could point the finger at his independent contractor and disclaim liability on the basis that the independent contractor's negligence should not be visited upon the employer.

[54] Based on the facts and findings of the learned trial judge as enumerated above, we find that the trial judge was correct in his finding that the court was impelled to hold that Hemraj was under a non-delegable duty of care and is liable for negligence together with the other tortfeasors, namely the third parties, albeit they are independent contractors. The excavation works on the public road was done illegally, without the requisite approval from TNB,

DBKL and IWK and without the utility mapping being done, by Hemraj's contractors blindly due to pressure from Hemraj.

Issue (iii) — Application of the Biffa principle

[55] Learned counsel for Hemraj had also submitted that the learned trial judge misapplied the exception on non-delegable duty of care when he had overlooked the principles established in *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GMBH* [2009] 3 WLR 3242 ('Biffa'), which was applied by this court in *Mehrzad*. The English Court of Appeal in *Biffa* has held that non-delegable duty in 'hazard' cases can only be applied to activities that are exceptionally dangerous whatever the precautions are taken. It is therefore the submission of Hemraj that the excavation works in the present appeal are not inherently dangerous works that attract non-delegable duty of care.

[56] In the first place, we are of the considered opinion that the negligent acts in the two cases relied upon by Hemraj, namely *Biffa* and *Mehrzad*, are clearly distinguishable from the facts of the present case. Those cases did not involve unlawful and illegal excavation on a public road. The facts of this appeal falls squarely within *Tenaga Nasional Bhd v Syarikat Bekalan Air Selangor Sdn Bhd & Anor*. As such, the learned trial judge was correct in applying the case of *Tenaga Nasional Bhd v Syarikat Bekalan Air Selangor Sdn Bhd & Anor*. In both *Tenaga Nasional Bhd v Syarikat Bekalan Air Selangor Sdn Bhd & Anor* and *TNB v Panareno*, the courts have held that held that excavation works on public roads is a hazardous activity which invites the application of the non-delegable duty of care on the employer.

[57] Added to that, the factual findings of the trial judge in this appeal is also critical to the findings of non-delegable duty of care. The learned trial judge had found that Hemraj was aware that utility mapping had to be done and that relevant permits must be obtained prior to the works commencing in order to minimise potential damage to underground installations. Moreover, the trial judge also found that Hemraj not only allowed, but appeared to have applied pressure for the works to be done as soon as possible without the pre-requisite conditions being complied with. The excavation work was done 'blindly' as held by the learned trial judge. There is also a clear finding that the works posed a great risk, as admitted by TP3, the sewerage contractor.

[58] It is also to be noted that *Tenaga Nasional Bhd v Syarikat Bekalan Air Selangor Sdn Bhd & Anor* was decided after the decision in *Mehrzad* and had categorised excavation work on public road as harzadous. Even though *Mehrzad* was not referred to in *Tenaga Nasional Bhd v Syarikat Bekalan Air Selangor Sdn Bhd & Anor*, the factual matrix of both cases are completely different. *Mehrzad* involved the construction of a bungalow on private land,

and the collapse of a structure had caused damage to the neighbour's land. The case does not involve excavation on public road, which the learned trial judge found to have been done *blindly*. The employer was held liable with the engineer and independent contractor as joint tortfeasors. Thus, the case is clearly distinguishable and Nallini JCA (as Her Ladyship then was) rightly held at the end of para 35 that 'each act and its circumstances should be looked at to determine whether an employer should be liable for the tort of the independent contractor'. Thus this court in *Mehrzad* had also accepted that in an appropriate case, non-delegable duty of care can be applied.

Dismissal of encl (101)

[59] For the sake of completeness, we will now deal with the decision of the trial judge to dismiss encl (101), which is an application for an order that the parties carry out a joint inspection to determine the damage to the cables. From the notes of proceedings, the learned trial judge had considered that this new issue involved an allegation of fraud which was not part of the pleaded case of Hemraj. In any event, the same is also the subject matter in Suit WA-2NCvC-863–11 of 2019.

CONCLUSION

[60] Based on the reasons enumerated above, we are of the considered opinion that the learned trial judge did not commit any appealable error that warrant our appellate intervention. The learned trial judge had carefully analysed the evidence in coming to his decision. We therefore dismiss the appeal with costs and affirm the decision of the learned trial judge.

Appeal unanimously dismissed and trial court's decision affirmed.

Reported by Ashok Kumar